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No. 93-1275

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

CECIL B. JACOBSON, JR., M.D.,
Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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The Government's brief in opposition explicitly concedes that there are conflicts among the circuits--in some cases, multiple conflicts--on three of the seven questions presented by the Petition (Opp.11-12, 15-17, 18-19, 21n.5). On the remaining four questions, the Government implicitly concedes (by failing to cite any supportive authority) that there is no other decision, in this Court or in any other court, that supports the rulings of the courts below. In both respects, the Government does not deny the importance of the questions presented. Rather, the Government mostly argues the merits, which is premature at this stage, and unresponsive to the Court's criteria for granting certiorari. Thus, perhaps the strongest ground for certiorari in this case is the Government's obvious inability to suggest any valid reason for declining review, for this case is one of the most extraordinary and, if unreviewed, potentially destructive, ever to come before this Court. It should be heard on the merits.

From the formulation of the Government's theories of prosecution through and including the mode of disposition on appeal, this case

is extraordinary and in some ways wholly unprecedented. The Government's brief does not deny these features, and it is silent in the face of their far-ranging implications, which threaten to rip apart the balance of federal and state powers, to undermine personal and professional autonomy, to chill free scientific thought, and to subvert the rule of law to the twin drives of federal prosecutorial excess and media sensationalism. It is precisely the constitutional role of this Court, as the guardian of our fundamental legal structures, to hear such cases.

I. The Encroachment of Federal Prosecution Upon State Regulatory Powers, Procreative Privacy, and Free Scientific Thought

On the first two questions presented (Pet.16-24), the Government's brief (Opp.8-11) completely fails to address the implications of the decision below for the structures of federalism, individual rights to procreative privacy, and a sensible approach to the clash of criminal law enforcement with scientific thought. Instead, the Government misstates the record and the questions presented.

A. The Government's Default of Response on the Key Points

As is often the case in adversarial presentation, the Government's brief is perhaps more revealing for what it fails to include than for what it does contain.

The Petition challenged the Government by noting that this case is "the first and only instance in which a physician has been convicted of federal criminal fraud on the basis of a direct governmental attack on the practice of medicine itself," and indeed was "the first and only case in which a physician has been convicted of *any* federal crime on the basis of any conduct that has not been shown and found, under appropriate jury instructions of the type that were refused here, to have been outside the scope of the professional practice of medicine." (Pet.2). In response, the Government does not deny these points, and cites no prior case of any kind involving such a situation, or in any way supporting the theory of prosecution here.

Furthermore, the Government does not deny any of the

implications of these facts for the development of federal law and the erosion of state authority and individual autonomy. The Government does not deny the established "practice of medicine" exception recognized under federal regulatory statutes (*see* Pet.20); it does not dispute that ignoring that restriction has profound implications for the displacement of state civil tort and regulatory law by federalized and criminalized standards (*see* Pet.18); it does not contest the implication that, as a result of the decision below, personal procreative decisions to create and sustain new life now have less constitutional protection than decision to terminate pregnancies by abortion (*see* Pet.20-21). Rather, the Government's brief here represents the endorsement of that agenda at the highest levels of the Executive Branch.

Nor does the Government deny the fact, amply documented in the published medical and scientific literature (*see* Pet.13-15), that Dr. Jacobson's theories and methods of infertility treatment, including those attacked by the Government's expert witnesses at trial as "unthinkable" (JA1264, Dr. Damewood),[1] "worthless" (JA917, Dr. Braunstein), and "inappropriate" (JA918, Dr. Braunstein), are now being vindicated by scientific research--including a paper published after trial by one of those very same witnesses (*see* Pet.15 &n.21)--and adopted in medical practice. Rather, the Government apparently proceeds on the view that scientific knowledge should be subverted to official orthodoxy, enforced through criminal prosecution.

B. The Government's Misstatements of the Record and the Questions Presented

Instead of addressing the key points forthrightly, the Government seeks to avoid their effect by misstating the record and the issues:

1. The Government argues that its case did not attack Dr. Jacobson's methods of treatment, but only "false representations concerning the nature and effect of his treatments" (Opp.9). The Government cites nothing from the record to support this

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[1] Citations to "JA-" are to pages of the Joint Appendix in the court of appeals.

distinction, and understandably so, because there is nothing.[2] Indeed, the court of appeals obviously thought otherwise, because it characterized the Government's case as predicated on showing that Dr. Jacobson "overexposed" his patients to hormone treatments (Pet.3a), thus implying the existence of some acceptable level of exposure, which in fact was the Government's case.

Merely on its face, the Government's distinction obviously is flimsy: the distinction between attacking a treatment and attacking representations as to that treatment's "nature and effect," is, to say the least, a distinction without much difference in operational effect. But even assuming some theoretical distinction, the Court should ask itself how the Government purported to show the "true" state of the "nature and effect" of the treatment, and the "falsity" of the representations. The answer is the obvious: by attacking the treatment itself, as the court of appeals recognized.

But even more fundamentally, it does not matter to the question presented what the evidence could be interpreted to show, because the error committed was in instructing the jury. Even the Government's gossamer distinction here was unknown to the jury, which was instructed completely without regard to the medical and scientific context of the case (*see* Pet.11).

2. Furthermore, the Government's attack on Dr. Jacobson's method of treatment was carried out wholly through expert testimony, which was met by conflicting testimony by defense experts, thus framing the second question presented by the Petition (*see* Pet.21-24). The Government's brief seeks to evade this issue with a triply misleading presentation:

First, the Government misstates the record as involving "virtually no conflict among expert witnesses concerning the appropriateness of petitioner's course of treatment for specific patients" (Opp.10). This statement is false. Both generally and as to specific patients,

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[2] Aside from its references to materials contained in the Appendix to the Petition, and to the Pre-Sentence Report (Opp.6), the Government's brief fails to contain a single citation--on any subject--to any material that was part of the record in the court of appeals or the district court. Instead, the Government's brief predicates its assertions of fact and evidence solely on its own prior brief in the court of appeals.

there was a sharp dispute between the prosecution and defense experts. Dr. Jacobson's use and dosage of HCG was attacked by prosecution expert Dr. Braunstein as "worthless" and "inappropriate" (JA917-18), and supported by defense expert Dr. Harrison as "perfectly good medicine" (JA1693). Dr. Jacobson's observation of a high rate of miscarriage and his theory of resorption, attacked by prosecution expert Dr. Damewood as "unheard of" (JA1257-59), was confirmed by defense experts Drs. Harrison and Campbell, on the basis of scientific studies (JA1685-87, 1777, 1943-44). On the question whether HCG caused false positive pregnancy test results or symptoms, prosecution expert Dr. Braunstein contended that "[t]here was no way he [Dr. Jacobson] could not have known" (JA936-37), while defense expert Dr. Harrison testified that the effects were "possible, but not probable" (JA1776) and that false positive test results could be attributable to a change in the tests' sensitivity of which Dr. Jacobson was unaware (JA1771-72). In every way, the medical principles and methods were sharply disputed.

Second, the Government seeks to emphasize "specific" patients rather than Dr. Jacobson's general approach in order to obscure the fact that the Government's theory was conclusively *dis*proved at trial. The theory of the Government's case was never that Dr. Jacobson misdiagnosed a few isolated sonograms or pregnancy tests, but rather that his entire course and method of treatment was a "scheme" and therefore a "fraud." That theory was disproved by the fact that Dr. Jacobson used the same techniques on all 1,000 of his fertility patients, that some 400 live births were achieved from that group, but less than 20 individual cases were attacked by the Government, which never explained how Dr. Jacobson could have distinguished out that group. (*See* Pet.8-9).

In any event, the Government here again misstates the record, which in fact shows sharp disagreements between the prosecution and defense experts on each of the specific incidents, as the defense experts were cross-examined in detail on those incidents, and they did not agree with the prosecutor. (*See* JA1739-77 (Dr. Harrison); 1949-2036 (Dr. Campbell)).

Third, the Government's argument of agreement on specific episodes of "medical fact" (Opp.10), aside from being a

misstatement of the record, complete misses the point of the question presented, which did not focus on the underlying "fact"--if any--but on Dr. Jacobson's state of mind. The question as presented is whether a finding of "criminal intent" may be predicted on conflicting expert testimony (Pet.i). As to that question, which is the one presented, the Government's brief says nothing, although its case rests necessarily on testimony like Dr. Braunstein's contention of what Dr. Jacobson "should" or "must" have known.

C. The Need for Guidance from this Court

In sum, the Government's brief provides this Court with no valid reason for denying review on these questions, and an additional ground supporting review. By failing to address the broad implications of the decision below, the Government concedes that those implications are present and are favored by the Executive Branch, which now can use a denial of review in this case as the predicate for an entirely new edifice of federal medical regulation through the criminal prosecution of physicians. The significance of that development would alone justify certiorari in this case.

But the Government's argument on the second question presented, regarding the use of expert testimony to convict for "fraud" on the basis of disagreement, has even broader implications. In essence, the Government argues that this Court's prior decisions in *Magnetic Healing* and *Reilly v. Pincus* set up a dichotomy under the federal fraud statutes between "two widely held schools of opinion" and "crystallized" scientific knowledge for purposes of using expert testimony to show fraudulent intent. (Opp.9-10). Of course, the application of such a dichotomy to rationalize the result in this case would be upside down: whereas the Court in *Reilly* was contrasting "crystallized" knowledge with continued adherence to a "thoroughly discredited" theory, here it is the testimony of the Government's experts that has been discredited by scientific research. More fundamentally, however, the Government's interpretation of these authorities as creating a group-think mentality of science is completely at odds with the true nature of scientific progress, as was recognized by this Court last term in its *Daubert* decision (*see* Pet.21). To the extent that the Government's interpretation may influence future prosecutions, this Court should grant review also to

re-examine the implications of *Reilly* and reaffirm the principle of *Magnetic Healing*, for otherwise, the future of free scientific thought will itself be imperiled.

II. The Conceded Conflict on "Reasonable Doubt"

The Government concedes that there is a conflict on the question whether "reasonable doubt" should be defined for a federal criminal jury (Opp.11-12), but argues that there is a "clear trend of recent authority in the federal courts" (Opp.12) against giving a definition. We disagree with the Government's argument of a "trend," as the case in those circuits upholding or recommending a definition are equally or more recent than those expressing reluctance (*see* Pet.24-25). But in any event, even if there were such a "trend," it would argue in favor of review at this time.

Apparently, the Government seeks to proffer the D.C. Circuit's recent decision in *United States v. Taylor*, 997 F.2d 1551 (D.C. Cir. 1993) as emblematic of its "trend." In that case, the D.C. Circuit shifted toward the view that "the greatest wisdom may lie" with the Fourth and Seventh Circuit position that juries should not given a definition. The *Taylor* court's reasoning obviously was influenced by this Court's recent decisions on review of state court definitions of reasonable doubt, *see* 997 F.2d at 1557-58, most notably the decision in *Sullivan v. Louisiana*, - U.S. -, 113 S. Ct. 2078 (1993), holding that deficient reasonable doubt charge is never harmless error. Thus, the logical conclusion of the *Taylor* court's reasoning is that a definition may lead to reversible error while a complete failure to define is not. That is certainly "wisdom" if the only objective is to minimize the prospect of reversal by a higher court. But whether it is "wisdom" in terms of the fundamental fairness of the federal criminal justice system is an entirely different matter--one that, given the incentives of the lower courts, can only be resolved by this Court.

III. Public Confrontation with an Anonymous Mask?

The Government's presentation on the Fifth and Sixth Amendment issues (Opp.12-14) only underscores the completely bizarre and unprecedented nature of the procedures followed at Dr. Jacobson's trial, for which the Government cites no supportive

precedent. Public confrontation and anonymous accusation simply cannot coexist, and anonymous accusation is outlawed by the Constitution. . . . Whether the constitutional protection can be outweighed by "higher values" than the accused's right to a fair and public trial, and whether such "higher values" include the privilege of anonymous accusation itself--for nothing else was involved here--are issues that should be decided by this Court.

IV. The Sentencing Guidelines Issues

1. The Government concedes that the upward departure on sentencing involves conflicts among the circuits as to both the required quality of proof of the departure factors and the appropriate basis for determining the magnitude of the upward departure. (Opp.15-19; *see* Pet.27-29). Both issues are obviously important to the effective operation of the sentencing guidelines system, and the Government does not argue otherwise.

Instead, the Government argues that "this case does not present a suitable vehicle" (Opp.19) apparently on the view that the magnitude of the upward departure was not sufficiently dramatic (Opp.17), or involved factors inadequately quantifiable (Opp.19). We disagree, and suggest that both of these factors actually make the case more appropriate a vehicle for providing guidance to the courts of appeals, as they provide more variations that the Court may address in this context. Furthermore, as the Government fails to note, the sentencing here involved no analysis whatsoever supporting the magnitude of the upward departure, and thus presents the polar case of its kind, directly raising the question whether a district court may depart upward to a level that is not justified by any reasoning at all in terms of its magnitude.

2. The Government also concedes, in essence, that the Ninth Circuit's *Niven* decision stands in opposition to the Fourth Circuit's decision below on the question whether dual guidelines and pre-guidelines sentencing for the same conduct violates the Double Jeopardy Clause (*see* Opp.19-21; *see also* Pet.29). Although the Government seeks to shade its concession by pointing to a dictum in the *Niven* decision concerning concurrent sentencing (Opp.20), in fact that analysis does not remove the constitutional problem presented by this case.

First, the imposition of concurrent sentences does not render the decision below "fully consistent" with *Niven*, as the Government argues (Opp.21), because the decision here, unlike *Niven*, failed to recognize any Double Jeopardy problem at all. This substantial constitutional question, supported by sister Circuit authority but of first impression to the Fourth Circuit, was one of those dismissed summarily by the court of appeals as "wholly without merit and therefore warrant[ing] no discussion on our part." (Pet.11a).

Second, as was noted in the Petition (Pet.29), concurrent sentences do not eliminate the Double Jeopardy problem, because guideline and pre-guideline sentences are legally distinct and have disparate practical consequences for time served, because exclusion of the loss caused by the pre-guidelines counts, as required by the Double Jeopardy Clause and *Niven*, necessarily reduces the guideline sentence, and therefore the time actually served. In a footnote, the Government's brief recognizes this point, but argues that the question is "of no continuing importance, as it arises only in a rapidly diminishing number of cases" (Opp.21n.5). Of course, the issue is of some "continuing importance" to Dr. Jacobson, who now is incarcerated in a federal prison camp, as well as all the other prisoners similarly incarcerated. And we do not agree that a violation of the constitutional rights of defendants in even a "diminishing number" should be considered a matter of "no continuing importance" to this Court. But, in any event, the Government is wrong in its suggestion that the issue is merely a matter of transition from non-guidelines to guidelines sentencing, because the same problem will recur with current and future changes to the guidelines, which can and have changed the weight assigned to sentencing factors such as loss, and thereby present exactly the same issue repeatedly.

Third, both in the future replications and in this case, the same feature raises the question whether the Ex Post Facto Clause also is violated, as this feature of the guidelines, whether applied to pre-guidelines conduct or to any other offense completed prior to the implementation or a change in guidelines, does in fact raise the sentence attributable to a completed offense, which is precisely what is prohibited by that Clause. In this respect, the ongoing problem is even more severe, as the impact of the retrospective change will

be all the more clear under a guidelines system.

VI. Supervision of the Courts of Appeals

Finally, the Government opposes (Opp.21-22) review by this Court of the question whether the courts of appeals will be held to any minimum standard of conduct in their disposition of federal criminal appeals. The Government cites no decision on point by this Court, and its reliance on a quotation from a court of appeals as to its own powers (Opp.22) only underscores the need for supervision in this area.

At a time when the number of cases reviewed in this Court has been declining, it is all the more important for this Court to exercise its opportunities to provide meaningful supervision to the courts of appeals. The twenty-year experiment with self-enforced local circuit rules has not been successful, and this Court should take a hand in providing uniform guidance, at least in terms of establishing minimum standards for the quality of appellate justice in the United States courts of appeals in criminal cases.

Conclusion

For the reasons stated above and in the Petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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